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IN THE

Supreme Court of the United States

OCTOBER TERM, [redacted]

No. [redacted] 8

CHRISTOPHER MITCHELL, JOHN BAILEY, JOSEPH GERIDEAU, JAMES GILBERT BLAKE, ANDREW BROWN, ALVIN DELFORD LATTEN, FRED SMALL, CORNELIUS FLUDD, CHARLES BUTLER, FRANCIS JOHNSON, DAVID PAUL RICHARDSON, JOSEPH JONES, ALFRED HAMILTON, HARVEY GANTT, ALLEN COLEY, KENNETH ANDREW GERMAN, CAROLYN JENKINS, ARTHUREE SINGLETON, JENNIESE BLAKE, DELORES BROWN, ANNETTE GRAHAM, CECILE GORDON, VERNA JEAN MCNEIL, MINERVA BROWN,

Petitioners,

—v.—

CITY OF CHARLESTON.

PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF SOUTH CAROLINA

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OCTOBER TERM, 1961

No. .....

CHRISTOPHER MITCHELL, JOHN BAILEY, JOSEPH GERIDEAU, JAMES GILBERT BLAKE, ANDREW BROWN, ALVIN DELFORD LATTEN, FRED SMALL, CORNELIUS FLUDD, CHARLES BUTLER, FRANCIS JOHNSON, DAVID PAUL RICHARDSON, JOSEPH JONES, ALFRED HAMILTON, HARVEY GANTT, ALLEN COLEY, KENNETH ANDREW GERMAN, CAROLYN JENKINS, ARTHUREE SINGLETON, JENNIESE BLAKE, DELORES BROWN, ANNETTE GRAHAM, CECILE GORDON, VERNA JEAN MCNEIL, MINERVA BROWN,

Petitioners,

—v.—

CITY OF CHARLESTON.

PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF SOUTH CAROLINA

Petitioners pray that a writ of certiorari issue to review the judgment of the Supreme Court of South Carolina, entered in the above entitled case on December 13, 1961, rehearing of which was denied on January 8, 1962.

Citation to Opinions Below

The opinion of the Supreme Court of South Carolina is reported at 123 S. E. (2d) 512 and is set forth in the appendix hereto, *infra*, pp. 9a-28a. The opinion of the Charleston County Court is unreported and is set forth in the appendix hereto, *infra*, pp. 1a-8a.

Jurisdiction

The Judgment of the Supreme Court of South Carolina was entered December 13, 1962, *infra*, pp. 9a-28a. Petition for Rehearing was denied by the Supreme Court of South Carolina on January 8, 1962, *infra*, p. 29a.

The jurisdiction of this Court is invoked pursuant to Title 28, United States Code, Section 1257(3), petitioners having asserted below and asserting here, deprivation of rights, privileges and immunities secured by the Constitution of the United States.

Questions Presented

1. Whether petitioners' conviction of trespass, while engaged in a sit-in demonstration at a department store lunch counter, offends the due process clause of the Fourteenth Amendment when the criminal statute applied to convict petitioners gave no fair and effective warning that their actions were prohibited, and their conduct violated no standard required by the plain language of the law or any earlier interpretation thereof.

2. Whether the due process and equal protection clauses of the Fourteenth Amendment permit a state to use its executive and judiciary to enforce racial segregation in conformity with a state custom of segregation by arresting and convicting petitioners of criminal trespass on the premises of a business which has for profit opened its property to the general public.

Statutory and Constitutional Provisions Involved

1. This case involves Section 1 of the Fourteenth Amendment to the Constitution of the United States.

2. This case also involves Section 16-386, Code of Laws of South Carolina for 1952, as amended, which states:

> *Entry on lands of another after notice prohibiting same.*
>
> Every entry upon the lands of another where any horse, mule, cow, hog or any other livestock is pastured, or any other lands of another after notice from the owner or tenant prohibiting such entry shall be a misdemeanor and be punished by a fine not to exceed one hundred dollars or by imprisonment with hard labor on the public works of the county for not exceeding thirty days. When any owner or tenant of any lands shall post a notice in four conspicuous places on the borders of such land prohibiting entry thereon a proof of the posting shall be deemed and taken as notice conclusive against the person making entry as aforesaid for the purpose of trespassing.

Statement

At 10:45 A.M. on April 1, 1960, petitioners, twenty-four Negro high school students entered the S. H. Kress and Company department store in Charleston, South Carolina (R. 11). They seated themselves at the lunch counter and sought service (R. 11, 17, 18, 50, 52). Rather than serve them, shortly after petitioners seated themselves (R. 11, 16) about 11 A.M. (R. 50), the manager roped off the counter (R. 11, 17, 47, 50), but did not request them to leave (R. 11). The police were called at 10:45 A.M. (R. 19) and

remained in the store for the rest of the day (R. 19). Petitioners sat at the counter until about 4:30 P.M. or for about five and one-half hours (R. 11, 23, 24, 48, 70). At no time during this period did anyone request petitioners to leave the counter (R. 11, 17, 29, 48).

At about 4:30 P.M., the Chief of Police of Charleston (R. 11) told the manager that the police had received an anonymous phone call claiming that a bomb would go off in the Kress store at 4:45 P.M. (R. 21, 22, 23, 11). As a result of this conversation, the manager, in the presence of the Chief of Police (R. 31), approached petitioners and "... asked them to leave for their own safety ..." (R. 11, 23). Other patrons in the store were asked to leave by the police, not the manager or store employees (R. 37). Petitioners remained seated at the counter (R. 12, 24). The Chief of Police then requested petitioners to leave (R. 24) and when they failed to respond, he placed them under arrest (R. 25). Petitioners were at no time informed that there was a "bomb scare" (R. 11, 24, 36). Later, the store was searched and no bomb was found (R. 41).

Kress and Company is a large nationwide chain (R. 13) which operates variety stores (R. 13). Negroes and whites are invited to purchase and are served alike in all departments of the store with the single exception that Negroes are not served at the lunch counter which is reserved for whites (R. 14, 15, 16). Negroes are not served at the lunch counter because, as the store manager testified, "he would be going against local customs" (R. 16). There was, however, no evidence that any signs or notices are present in the store indicating that Negroes are not served at the lunch counter.

Throughout the events that led to their arrest, petitioners were completely orderly and peaceful (R. 38, 40).

Petitioners were charged under a warrant which alleged that they did

> "unlawfully, knowingly and willfully commit a trespass, in that *they did refuse to leave* the premises and property of S. H. Kress & Company, having been requested and ordered to leave, vacate and remove themselves from said premises all in violation of Title 16, Section 386 of the Code of Laws of South Carolina for 1952, as amended." [Emphasis added.]

Title 16, Section 386 states:

> ***Entry on lands of another after notice prohibiting same.***
>
> "*Every entry upon the lands of another* where any horse, mule, cow, hog or any other livestock is pastured, or any other lands of another, *after notice from the owner or tenant prohibiting such entry shall be a misdemeanor* and be punished by a fine not to exceed one hundred dollars or by imprisonment with hard labor on the public works of the county for not exceeding thirty days. When any owner or tenant of any lands shall post a notice in four conspicuous places on the borders of such land prohibiting entry thereon a proof of the posting shall be deemed and taken as notice conclusive against the person making entry as aforesaid for the purposes of trespassing." [Emphasis added.]

Petitioners were also charged with a violation of Section 33-39, Code of the City of Charleston in that they did "interfere with . . . [an] officer . . . of the police department of the City" when they did not leave the lunch counter when ordered to do so by the Chief of Police.

Petitioners were tried and convicted of both offenses in the Recorder's Court of the City of Charleston without a

jury, and sentenced to pay fines of $50.00 or serve fifteen days in jail for each offense (R. 56), the sentences to run consecutively (R. 56).

Petitioners appealed to the Charleston County Court which affirmed the judgments of conviction of the Recorder's Court of the City of Charleston on June 26, 1961, *infra*, pp. 1a-8a.

They then appealed to the Supreme Court of South Carolina which affirmed the judgment of conviction of trespass in violation of Title 16, Section 386 of the 1952 Code of Laws of South Carolina, as amended, and reversed the judgment of conviction for the offense of interfering with a police officer on December 13, 1961, *infra*, pp. 9a-28a. The Supreme Court of South Carolina denied rehearing on January 8, 1962, *infra*, p. 29a.

City of Columbia v. *Barr, et al.*, —— S. C. ——, 123 S. E. 2d 521, a sit-in case involving the same trespass statute, was decided at the same time, and a petition for certiorari in that case is being submitted simultaneously with this one.

How the Federal Questions Were Raised and Decided Below

At the commencement of trial in the Recorder's Court, petitioners moved to dismiss the warrant against them on the ground that:

> "Title 16, Section 386 does not charge trespass, but it set out the entry after notice. In that there are no allegations in the warrant which shows an entry we feel as though the warrant is insufficient in that it does not substantially apprise the defendants of the crime set forth in this warrant . . . " (R. 8).

The motion was overruled by the trial Court (R. 8).

Petitioners appealed to the Charleston County Court claiming error in that the warrant under which they were convicted did not set forth the offense charged, "in that it does not specifically set forth the manner in which it is contended that the defendants entered the lands of another after notice from the owner . . . thereby failing to provide the defendants with sufficient information to meet the charge against them . . . [in] deprivation of defendants' liberty without due process of law, secured by the Fourteenth Amendment to the United States Constitution" (R. 62).

The Charleston County Court ruled that the warrant set forth the offense charged and was not vague, uncertain and indefinite (R. 71). The Court held petitioners were trespassers under Title 16, Section 386 (R. 74).

Petitioners appealed this ruling to the Supreme Court of South Carolina (R. 78) asserting that the warrant did not apprise them of the nature and cause of the accusation against them (R. 78). Petitioners' contended that Title 16, Section 386, only made criminal an entry upon the premises of another "after notice from the owner or tenant prohibiting such entry", *infra*, p. 16a, and to convict petitioners on the ground that they remained upon the premises after notice to leave was to open the Statute to the vice of vagueness (R. 78). Relying principally on *State* v. *Avent*, 253 N. C. 580, 118 S. E. 2d 47, petition for writ of certiorari pending in this Court, No. 85, October Term 1961, the South Carolina Supreme Court rejected petitioners' contention holding that under Title 16, Section 386 "' . . . a person who remains on the lands of another after being directed to leave is guilty of a wrongful entry even though the original entrance was peaceful'", *infra*, p. 18a. Under this construction of the statute, the warrant was not uncertain and indefinite, *infra*, pp. 13a-15a.

At the close of the City's case in the trial court, defendants moved to dismiss the case against them on the ground that " . . . the Defendants were arrested on the basis of race and color under color of law to enforce the S. H. Kress and Company store racially discriminatory policy, thereby violating the Defendants right to due process of law and equal protection protected to them by the Fourteenth Amendment of the United States Constitution" (R. 42, 43). The motion was denied (R. 43). The motion was renewed at the close of the trial (R. 53, 54), and again denied (R. 54). Defendants moved for a new trial and arrest of judgment on the same ground (R. 56-58). The motion was denied (R. 58). Defendants excepted to these rulings by the trial court (R. 63-65, 78, 79) and defendants' exceptions were overruled, on the merits, by the Charleston County Court and the Supreme Court of South Carolina, *infra*, pp. 6a, 7a, 20a-24a. The Supreme Court of South Carolina, in disposing of petitioners' contention that South Carolina enforced racial discrimination held that "Section 16-386 of our code is not a racial segregation [statute]," *infra*, p. 21a, and that the acts of state officials in enforcing the trespass statute did not constitute "state action enforcing racial segregation" *infra*, pp. 24a, 21a-23a.

REASONS FOR GRANTING THE WRIT

I.

The Criminal Statute and Warrant Applied to Convict Petitioners Gave No Fair and Effective Warning That Their Actions Were Prohibited; Petitioners' Conduct Violated No Standard Required by the Plain Language of the Law or Any Earlier Interpretation Thereof; Thereby Their Convictions Offend the Due Process Clause of the Fourteenth Amendment and Conflicts With Principles Enunciated by This Court.

Petitioners were convicted under Title 16, Section 386 of the Code of Laws of South Carolina of 1952 which provides:

> *Every entry upon the lands of another where any horse, mule, cow, hog or any other livestock is pastured, or any other lands of another, after notice from the owner or tenant prohibiting such entry shall be a misdemeanor* and be punished by a fine not to exceed one hundred dollars or by imprisonment with hard labor on the public works of the county for not exceeding thirty days. When any owner or tenant of any lands shall post a notice in four conspicuous places on the borders of such land prohibiting entry thereon a proof of the posting shall be deemed and taken as notice conclusive against the person making entry as aforesaid for the purpose of trespassing. [Emphasis added.]

Although the statute in terms forbids only entry on the land of another *after* notice prohibiting one to do so, the Supreme Court of South Carolina has now construed the statute to forbid also *remaining* on property when directed to leave following lawful entry, *infra*, pp. 18a-19a. In short, the statute is now applied as if "remaining" were substi-

tuted for "entry". There is no history of such a construction of the statute.[1] No South Carolina case has ever adopted such a construction. The statute, Section 16-386, was originally passed in the Nineteenth Century and although amended on numerous occasions it has never lost its character as a measure intended to punish entry on farm land. The instant case is the first case which directly or indirectly convicts defendants who went upon property with permission and merely refused to leave when directed for unlawful "entry".

Subsequent to petitioners' conviction the legislature of the State of South Carolina enacted into law Section 16-388 a trespass statute making criminal failing and refusing "to leave immediately upon being ordered or requested to do so" the premises or place of business of another. See Petition for Writ of Certiorari filed in this Court in *Peterson et al. v. City of Greenville*, No. 750, Oct. Term, 1961.

There is no question but that petitioners and all Negroes were welcome within the Kress store—apart from the lunch counter area (R. 14, 46, 47). The manager of the store testified that Negroes "are welcome to do business in those departments [other than the lunch counter]" (R. 16). The lunch counter is an integral part of the store (R. 11, 37, 46) so that the only "entry" petitioners made was to the store itself. There is no evidence of racial signs or notices of any kind at the lunch counter. Whatever petitioners' knowledge of the store's racial policy as it had been prac-

[1] As authority for this construction the Supreme Court of South Carolina cites the charge to the jury in *State* v. *Williams*, 76 S. C. 135, 56 S. C. 783, a murder case. No question of the meaning of criminal trespass was involved in that case. *Shramek* v. *Walker*, 152 S. C. 88, 149 S. E. 331, also cited by the Supreme Court of South Carolina, was a civil suit for trespass. But civil and criminal trespass have long been distinguished, the latter requiring, at common law, special circumstances such as breach of the peace. *Rex* v. *Storr*, 3 Burr. 1698. Cf. American Law Institute, Model Penal Code, Tentative Draft No. 2, §206.53, Comment.

ticed (and petitioners' testified they thought they might be served (R. 47, 51, 52)) there was no suggestion that they had ever been forbidden to go to the lunch counter and request service.

Absent the special expansive interpretation given §16-386 by the South Carolina Supreme Court the case would plainly fall within the principle of *Thompson* v. *City of Louisville*, 362 U. S. 19, and would be a denial of due process of law as a conviction resting upon no evidence of guilt. There was obviously no evidence that petitioners entered the premises "after notice . . . prohibiting such entry" and the conclusion that they did rests solely upon the special construction of the law. Petitioners were not even charged with "entry" but with trespass "in that they did refuse to leave the premises" (R. 5).

Under familiar principles the construction given a state's statute by its highest court determines its meaning. Petitioners submit, however, that this statute has been judicially expanded to the extent that it does not give a fair and effective warning of the acts it now prohibits. Because of the expansive construction, the statute now reaches more than its words fairly and effectively define, and therefore, as applied it offends the principle that criminal laws must give fair and effective notice of the acts they prohibit.

The due process clause of the Fourteenth Amendment requires that criminal statutes be sufficiently explicit to inform those who are subject to them what conduct on their part will render them criminally liable. "All are entitled to be informed as to what the State commands or forbids", *Lanzetta* v. *New Jersey*, 306 U. S. 451, 453, and cases cited therein in note 2.

Construing and applying federal statutes this Court has long adhered to the principle expressed in *Pierce* v. *United States*, 314 U. S. 306, 311:

> . . . judicial enlargement of a criminal act by interpretation is at war with a fundamental concept of the common law that crimes must be defined with appropriate definiteness. Cf. Lanzetta v. New Jersey, 306 U. S. 451, and cases cited.

In *Pierce, supra,* the Court held a statute forbidding false personation of an officer or employee of the United States inapplicable to one who had impersonated an officer of the T. V. A. Similarly in *United States* v. *Cardiff*, 344 U. S. 174, this Court held too vague for judicial enforcement a criminal provision of the Federal Food, Drug, and Cosmetic Act which made criminal a refusal to permit entry or inspection of business premises "as authorized by" another provision which, in turn, authorized certain officers to enter and inspect "after first making request and obtaining permission of the owner." The Court said in *Cardiff*, at 344 U. S. 174, 176-177"

> The vice of vagueness in criminal statutes is the treachery they conceal either in determining what persons are included or what acts are prohibited. Words which are vague and fluid (cf. United States v. L. Cohen Grocery Co., 255 U. S. 81) may be as much of a trap for the innocent as the ancient laws of Caligula. We cannot sanction taking a man by the heels for refusing to grant the permission which this Act on its face apparently gave him the right to withhold. That would be making an act criminal without fair and effective notice. Cf. Herndon v. Lowry, 301 U. S. 242.

The Court applied similar principles in *McBoyle* v. *United States*, 283 U. S. 25, 27; *United States* v. *Weitzel*, 246 U. S. 533, 543, and *United States* v. *Wiltberger*, 18 U. S. (5

Wheat.) 76, 96. Through these cases run a uniform application of the rule expressed by Chief Justice Marshall:

> It would be dangerous, indeed, to carry the principle, that a case which is within the reason or mischief of a statute, is within its provisions, so far as to punish a crime not enumerated in the statute, because it is of equal atrocity, or of kindred character, with those which are enumerated (Id. 18 U. S. (5 Wheat.) at 96).

The cases discussed above involved federal statutes concerning which this Court applied a rule of construction closely akin to the constitutionally required rule of fair and effective notice. This close relationship is indicated by the references to cases decided on constitutional grounds. The *Pierce* opinion cited for comparison *Lanzetta* v. *New Jersey, supra*, and "cases cited therein," while *Cardiff* mentions *United States* v. *L. Cohen Grocery Co., supra*, and *Herndon* v. *Lowry, supra*.

On its face the South Carolina trespass statute warns against a single act, i.e., entry upon the land of another "after" notice prohibiting such. "After" connotes a sequence of events which by definition excludes going on or entering property "before" being forbidden. The sense of the statute in normal usage negates its applicability to petitioners' act of going on the premises with permission and later failing to leave when directed.

But by judicial interpretation "entry" was held synonymous with "remaining" and, in effect, also with "trespass". Here a legislative *casus omissus* was corrected by the court. But as Mr. Justice Brandeis observed in *United States* v. *Weitzel, supra*, at 543, a *casus omissus* while not unusual, and often undiscovered until much time has elapsed, does not justify enlargement of a criminal statute.

Moreover, that the warrant specified that petitioners had refused to leave after being ordered to do so, does not correct the unfairness inherent in the statute's failure specifically to define a refusal to leave as an offense. As this Court said in *Lanzetta* v. *New Jersey, supra*:

> It is the statute, not the accusation under it, that prescribes the rule to govern conduct and warns against transgression. See Stromberg v. California, 283 U. S. 359, 368; Lovell v. Griffin, 303 U. S. 444.

Petitioners do not contend for an unreasonable degree of specificity in legislative drafting. Some state trespass laws have recognized as distinct prohibited acts the act of going upon property after being forbidden and the act of remaining when directed to leave.[2] South Carolina passed a statute punishing those who remain after being directed to leave within a month of petitioners' conviction, Section 16-388, Code of Laws of South Carolina. See *supra*, p. 10. Converting, by judicial construction, the common English word "entry" into a word of art meaning "remain" or "trespass" has transformed the statute from one which

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[2] See for example the following state statutes which do effectively differentiate between "entry" after being forbidden and "remaining" after being forbidden. The wordings of the statutes vary but all of them effectively distinguish the situation where a person has gone on property after being forbidden to do so, and the situation where a person is already on property and refuses to depart after being directed to do so, and provide separately for both situations: Code of Ala., Title 14, §426; Compiled Laws of Alaska Ann. 1958, Cum. Supp. Vol. III, §65-5-112; Arkansas Code, §71,1803; Gen. Stat. of Conn. (1958 Rev.), §53-103; D. C. Code §22-3102 (Supp. VII, 1956); Florida Code, §821.01; Rev. Code of Hawaii, §312-1; Illinois Code, §38-565; Indiana Code, §10-4506; Mass. Code Ann. C. 266, §120; Michigan Statutes Ann. 1954, Vol. 25, §28.820(1); Minnesota Statutes Ann. 1947, Vol. 40, §621.57; Mississippi Code §2411; Nevada Code, §207.200; Ohio Code, §2909.21; Oregon Code, §164.460; Code of Virginia, 1960 Replacement Volume, §18.1-173; Wyoming Code, §6-226.

fairly warns against one act into a law which fails to apprise those subject to it "in language that the common world will understand, of what the law intends to do if a certain line is passed" (*McBoyle* v. *United States*, 283 U. S. 27). Nor does common law usage of the word "entry" support the proposition that it is synonymous with "trespass" or "remaining". While "entry" in the sense of going on and taking possession of land is familiar (Ballantine, "Law Dictionary" (2d Ed. 1948), 436; "Black's Law Dictionary" (4th Ed. 1951, 625), its use to mean remaining on land and refusing to leave it when ordered off is novel.

Judicial construction often has cured criminal statutes of the vice of vagueness, but this has been construction which confines, not expands, statutory language. Compare *Chaplinsky* v. *New Hampshire*, 315 U. S. 568, with *Herndon* v. *Lowry*, 301 U. S. 242.

At the time of their arrest, petitioners were engaged in the exercise of free expression by verbal and nonverbal requests for nondiscriminatory lunch counter service, implicit in their continued remaining at the lunch counter when refused service.

If in the circumstances of this case free speech is to be curtailed, the least one has a right to expect is reasonable notice in the statute under which convictions are obtained. *Winters* v. *New York*, 333 U. S. 507. To uphold petitioners' conviction by novel and enlarged construction of this statute is to violate the principle that when freedom of expression is involved conduct must be proscribed within a statute "narrowly drawn to define and punish specific conduct as constituting a clear and present danger to a substantial interest of the State", *Cantwell* v. *Connecticut*, 310 U. S. 296, 307, 308; *Garner* v. *Louisiana*, 368 U. S. 157, 185 (Mr. Justice Harlan concurring). If the Supreme Court of South Carolina can affirm the convictions of these peti-

tioners by such a construction it has exacted obedience to a rule or standard that is so ambiguous and fluid as to be no rule or standard at all. *Champlin Ref. Co.* v. *Corporation Com. of Oklahoma*, 286 U. S. 210. But when free expression is involved, the standard of precision is greater: the scope of construction must, consequently be less. If this is the case when a State court limits a statute it must *a fortiori* be the case when a State court expands the meaning of the plain language of a statute. *Winters* v. *New York*, 333 U. S. 507, 512.

As construed and applied, the law in question no longer informs one what is forbidden in fair terms, and no longer warns against transgression. This failure offends the standard of fairness expressed by the rule against expansive construction of criminal laws which is embodied in the due process clause of the Fourteenth Amendment.

II.

The State of South Carolina Has Enforced Racial Discrimination Contrary to the Equal Protection and Due Process Clauses of the Fourteenth Amendment to the Constitution of the United States.

Petitioners were not served in Kress's because they were Negroes and the custom of the City of Charleston is that Negroes may not be served at counters which also cater to whites (R. 14, 17). No other variety store lunch counter in Charleston would have served petitioners either (R. 14). They sat at the counter, however, because they thought the management "might" "change their mind and serve" them (R. 50). If they had been served when they sought service, they would have been out of the store and away from the counter shortly after having entered it, in the morning, well before 4:45 P.M. (R. 17).

As things were, they remained seated at the counter until late afternoon when there was a "bomb scare." Pursuant to police and fire department policy (R. 27, 41), the store manager asked the petitioners to leave the store, although neither police, fire, nor store officials informed petitioners that there was a "bomb scare" (R. 36, 48). It may be noted that at the same time the police themselves directed other patrons to depart (R. 37). Upon petitioners' failure to leave, police arrested them for trespassing.

In the context of the entire episode petitioners were, therefore, arrested for two reasons—indirectly to enforce the custom of racial segregation and because of the "bomb scare"—as the chief of police acknowledged upon cross examination:

> Q. Now, Chief, when you asked these twenty-four young people to leave Kress's Store, weren't you just helping the manager of Kress to maintain the policy [of not serving Negroes at the lunch counter] which the store already followed? A. I would say indirectly, yes. Paramount and more so for the safety of everyone leaving the building (R. 33).

Failure to depart from the premises because of the "bomb scare," stems from Charleston's and Kress's segregation policy. Petitioners never would have been in the store at the time of the bomb threat if they had been served on the same basis as white persons. Moreover, to the exent that petitioners have an immunity from arrest to enforce racial segregation—discussed in detail below—they had a right to persist in demanding service. If some secret, nonracial reason existed whereby anyone without regard to race might have been required to leave, they hardly could have been expected to conform to the demand without knowing that suddenly a nonracial standard was being applied. The case is as *Boynton* v. *Virginia*, 364 U. S. 454, would have

been, if unknown to Boynton he were asked to leave the premises because of a "bomb scare." If knowing that the management is disabled from enforcing a demand to depart based upon race, by police and judicial action, one persists in demanding service, it hardly can be made criminal that the manager has a secret nonracial reason which subsequently he discloses.

Indeed, petitioners originally were charged with two offenses, (1) trespass and (2) interfering with a police officer, in violation of a Charleston ordinance. The conviction on the second charge was reversed by the State Supreme Court on the ground that petitioners' conduct was passive, not active, and did not constitute "interference", *infra*, p. 27a. The refusal to obey the police with respect to the bomb situation, therefore, no longer appears to be in the case. To the extent that the management ordered petitioners to leave because of the "bomb" situation, it was carrying out police and fire department policy, not asserting a "property" right.

The subsisting offense, trespass, is one against the State's interest in enforcing Kress's "property right," not in police regulation of a dangerous situation involving a "bomb scare."

The Supreme Court of South Carolina recognized the issue in this case to be whether police and judicial enforcement of Kress's racial segregation policy violated the equal protection clause of the Fourteenth Amendment.

> The appellants assert that the court erred in refusing to hold that their arrests and convictions were in furtherance of a custom of racial segregation in violation of the Fourteenth Amendment to the United States Constitution. It is also asserted that enforcement of segregation in this case was by State action within the meaning of such Fourteenth Amendment (*infra*, p. 20a).

It answered this question contrary to petitioners' position by relying upon cases involving similar issues, some of which are now pending before this Court, e.g., *Randolph* v. *Virginia*, 202 Va. 661, 119 S. E. 2d 817 (No. 248, October Term, 1961); *City of Greenville* v. *Peterson*, 122 S. E. 2d 826 (No. 750, October Term, 1961); *State* v. *Avent*, 253 N. C. 580, 118 S. E. 2d 47 (No. 85, October Term, 1961).

But the decision below flies in the face of principles declared by this Court. Where there is state action by the police, *Screws* v. *United States*, 325 U. S. 91; *Monroe* v. *Pape*, 365 U. S. 167; prosecutors, *Napue* v. *Illinois*, 360 U. S. 264, and judiciary, *Shelley* v. *Kraemer*, 334 U. S. 1, 14-18; *Boynton* v. *Virginia*, 364 U. S. 454, racial discrimination supported by state authority violates the Fourteenth Amendment. *Civil Rights Cases*, 109 U. S. 3, 17.

It is asserted, however, that the state is not enforcing racial discrimination, but is implementing a property right. But to the extent that management was asserting a "property" right to enforce racial segregation according to the custom of the City of Charleston, it becomes pertinent to inquire just what that property right is.

The mere fact that "property" is involved does not settle the matter, *Shelley* v. *Kraemer*, 334 U. S. 1, 22. "Dominion over property springing from ownership is not absolute and unqualified." *Buchanan* v. *Warley*, 245 U. S. 60, 74; *United States* v. *Willow River Power Co.*, 324 U. S. 499, 510; *Marsh* v. *Alabama*, 326 U. S. 501, 506; cf. *Munn* v. *Illinois*, 94 U. S. 113; *Republic Aviation Corp.* v. *N. L. R. B.*, 324 U. S. 793, 796, 802.

Kress's is a commercial variety store open to the public generally for the transaction of business, including the sale of food and beverages at is lunch counter. It does not seek to keep everyone, or Negroes, or these petitioners from

coming upon the premises. The white public is invited to use all the facilities of the store and Negroes are invited to use all these facilities except the lunch counter. The management does not seek to exclude petitioners because of an arbitrary caprice, but rather, follows the community custom of Charleston which is, in turn, supported and nourished by law.

The portion of the store from which petitioners are excluded is not set aside for private or non-public use as an office reserved for the management or lounge or private restroom for employees. Petitioners did not seek to use the lunch counter for any function inappropriate to its normal use. They merely sought lunch counter service. Therefore, it appears that the property interest which the State protects here, by arrest, prosecution, and criminal conviction, is the claimed right to open the premises to the public generally, including Negroes, for business purposes, including the sale of food and beverages, while racially discriminating against Negroes, as such, at one integral part of the facilities. While this may, indeed, be a property interest, the question before this Court is whether the State may enforce it without violating the Fourteenth Amendment. This property interest certainly may be taken away by the State without violating the Fourteenth Amendment. *Western Turf Asso.* v. *Greenberg*, 204 U. S. 359; *Railway Mail Assn.* v. *Corsi*, 326 U. S. 88; *Pickett* v. *Kuchan*, 323 Ill. 138, 153 N. E. 667, 49 A. L. R. 499 (1926); *People* v. *King*, 110 N. Y. 419, 18 N. E. 245 (1888); Annotation 49 A. L. R. 505; cf. *District of Columbia* v. *John R. Thompson Co.*, 346 U. S. 100.

Many states make it a crime to engage in the racially discriminatory use of private property which South Carolina enforces here. For the latest collection of such statutes, see Konvitz, *A Century of Civil Rights* (1961), *passim*. Indeed, Kress's has sought to achieve in this case some-

thing which the State itself could not permit it to do on state property leased to it for business use. *Burton* v. *Wilmington Parking Authority*, 365 U. S. 715, or require or authorize it to do by positive legislation. See Mr. Justice Stewart's concurring opinion in *Burton*, *supra*. Although it does not necessarily follow from the fact that some states constitutionally may make racial discrimination on private property criminal, that other states may not enforce racial discrimination, it does become evident that Kress's property interest is hardly inalienable or absolute.

Basic to the disposition of this case is that Kress is a public establishment open to serve the public as a part of the public life in the community. See *Garner* v. *Louisiana*, 368 U. S. 157, 176, Mr. Justice Douglas concurring. The case involves no genuine claim that Kress's right "private" use of its property was interfered with by petitioners. To uphold petitioners' claims here affects only slightly the entire range of what are called private property rights. For if Kress is disabled by the Fourteenth Amendment from enforcing by state action racial bias at its public lunch counter, homeowners are hardly disabled from enforcing their private rights even to implement racial prejudices. There is a constitutional right of privacy protected by the due process clause of the Fourteenth Amendment. *Mapp* v. *Ohio*, 367 U. S. 643, 6 L. ed. 2d 1081, 1080, 1103, 1104; see also *Poe* v. *Ullman*, 367 U. S. 497, 6 L. ed. 2d 989, 1006, 1022-1026 (dissenting opinions). This Court has recognized the relationship between right of privacy and property interests. *Thornhill* v. *Alabama*, 310 U. S. 88, 105-106; *Breard* v. *Alexandria*, 341 U. S. 622, 626, 638, 644. Only a very absolutist view of the property right to determine who may come or stay on one's property on racial grounds would require that a unitary principle apply to the whole range of property uses, public connections, dedications, and privacy interests which may be at stake.

As Mr. Justice Holmes stated in *Hudson County Water Co.* v. *McCarter*, 209 U. S. 349, 355:

> All rights tend to declare themselves absolute to their logical extreme. Yet all in fact are limited by the neighborhood of principles of policy which are other than those on which the particular right is founded, and which become strong enough to hold their own when a certain point is reached.

Where a right of private property is asserted by a proprietor so narrowly as to claim state intervention only in barring Negroes from a single portion of a public establishment, and that restricted assertion of right collides with the great immunities of the Fourteenth Amendment, petitioners respectfully submit that the property right is no right at all.

Moreover, the assertion of racial prejudice here is not "private" at all. The segregation here enforced is that demanded by custom of the City of Charleston. While "custom" is referred to in the *Civil Rights Cases* as one of the forms of state authority within the prohibitions of the Fourteenth Amendment, 109 U. S. 3, 17 (see also Mr. Justice Douglas concurring in *Garner* v. *Louisiana*, 368 U. S. 157, 179, 181), Charleston's custom exists in a context of massive state support of racial segregation.[3]

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[3] See S. C. A. & J. R. 1952 (47) 2223, A. & J. R. 1954 (48) 1695 repealing S. C. Const. Art. 11, §5 (1895) (which required legislature to maintain free public schools). S. C. Code §§21-761 to 779 (regular school attendance) repealed by A. & J. R. 1955 (49) 85; §21-2 (appropriations cut off to any school from which or to which any pupil transferred because of court order; §21-230(7) (local trustees may or may not operate schools); §21-238 (1957 Supp.) (school officials may sell or lease school property whenever they deem it expedient); S. C. Code §40-452 (1952) (unlawful for cotton textile manufacturer to permit different races to work together in same room, use same exits, bathrooms, etc., $100 penalty and/or imprisonment at hard labor up to 30 days; S. C. A. & J. R. 1956 No. 917 (closing park involved in desegregation suit);

Consequently, we have here state nurtured and state enforced racial segregation in a public institution concerning which no property right may be asserted in the face of the Fourteenth Amendment's prohibition of state enforced racial segregation. This state enforced segregation conflicts with Fourteenth Amendment principles which have been consistently asserted by this Court.

CONCLUSION

WHEREFORE, for the foregoing reasons petitioners respectfully pray that the Petition for Writ of Certiorari be granted.

Respectfully submitted,

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S. C. Code §§51-1, 2.1-2.4 (1957 Supp.) (providing for separate State Parks) §51-181 (separate recreational facilities in cities with population in excess of 60,000); §5-19 (separate entrances at circus); S. C. Code Ann. Tit. 58, §§714-720 (1952) (segregation in travel facilities).

APPENDIX

IN THE

CHARLESTON COUNTY COURT

CITY OF CHARLESTON,

Respondent,

—v.—

MITCHELL, *et al.*,

Appellants.

Order of the Charleston County Court

This is an appeal from the Recorder's Court of the City of Charleston, there, on April 19, 1960, the twenty-four (24) named defendants were tried and found guilty of violating Section 16-386 of the Code of Laws of South Carolina for 1952, and Section 33-39 of the Ordinances of the City of Charleston, 1952. The defendants were charged on two separate warrants, the first charging all of the defendants, and each of them, with committing a trespass upon the property of S. H. Kress & Company in the City of Charleston, and the second charging all of the defendants, and each of them, with resisting and interfering with the Chief of Police of the City of Charleston in the discharge of his official duties.

The record shows that on April 1, 1960, at about 10:45 A. M. the twenty-four (24) defendants, all of whom are young Negroes, entered the premises of S. H. Kress & Company in the City of Charleston and seated themselves at the lunch counter. Shortly after they occupied seats at the lunch counter, the counter was closed for business

and the area was roped off. The defendants remained seated at the counter until about 4:30 P. M., at which time Mr. Albert C. Watts, the manager of the Kress store, approached the group, told them who he was, and requested them to leave the store premises. He repeated his request, but the defendants remained seated. The evidence shows that the City Police had received an anonymous telephone call reporting that there was a bomb in the store set to go off at 4:45 P. M. This information was relayed to the Chief of Police, who was stationed in the Kress store at the time, and he in turn reported this information to Mr. Watts, the store manager. Mr. Watts determined at that time to close the store and clear the building of all employees and customers. It was then that he approached the defendants and asked them twice to leave the premises. Immediately thereafter, the Chief of Police spoke to the defendants, identified himself, and ordered them to leave the store. The defendants remained seated and the Chief repeated his order. When the defendants refused to leave, they were placed under arrest.

Upon trial and conviction in Recorder's Court, each of the defendants was sentenced to pay a fine of Fifty ($50.00) Dollars or serve a term of fifteen (15) days in jail on each of the charges, the sentences to run concurrently. All of the defendants have appealed the rulings and the judgments of the Recorder of the City of Charleston.

Before pleading to the charges, the defendants challenged the sufficiency of the two separate warrants and moved for dismissal of both warrants on the ground that they were vague, uncertain and indefinite and did not plainly set forth the offenses charged. The defendants' motion for dismissal were denied by the Recorder, and properly so in the opinion of this Court.

Order of the Charleston County Court

Our State Constitution, in Article 1, Section 18, affords to a person charged with a criminal offense the right to be fully informed of the nature and cause of the accusation. An inspection of the warrants in this case reveals that the offenses charged are stated in clear and definite language which fully and adequately informed the defendants of the nature and cause of the charges.

Before entering pleas at trial, the defendants moved to require the City of Charleston, under Section 15-902 of the State Code, to elect which of the charges preferred against them the City would proceed to trial on. It was the defendants' contention that the offenses charged actually arose out of the same facts and circumstances and were, in fact, not separate acts but a single act on the part of the defendants. The Recorder overruled this motion.

Section 15-902 provides that "whenever a person be accused of committing *an act* which is susceptible of being designated as several different offenses, the magistrate or the municipal court * * * shall be required to elect which charge to prefer. * * *" (Emphasis added.)

In the light of the evidence, it is the opinion of this court that the motion to elect was properly overruled by the trial judge. The evidence clearly shows that the defendants were first requested by the manager of Kress to leave the store premises. They refused this request, and *thereafter*, they refused an order of the Chief of Police. In fact and in law, these were two separate and distince acts on the part of the defendants. The first act was directed against the private property rights of S. H. Kress & Company, while the second act, entirely different in nature, was directed against the Sovereign in the person of the Chief of Police of the City of Charleston. The acts did not

happen at the same time, and it was entirely possible for the defendants to be guilty of one offense and innocent of the other.

Section 15-902 contemplates a single "act". Here, we have two separate and independent refusals to leave the store premises. The act of trespass was final and complete before there occurred the entirely independent act of interference with a police officer in the discharge of his duty.

At the close of the case for the prosecution, and again after the close of all evidence, the defendants interposed motions for dismissal of the charge. Each motion was overruled. After judgment and sentencing, the defendants moved for arrest of judgment or in the alternative, for a new trial on basically the same grounds which were cited in support of their earlier motions for dismissal. The Recorder overruled such motions.

In their Notice of Intention to Appeal as well as in their brief, the defendants in essence contend that their arrest and subsequent conviction constitutes State action to enforce racial segregation, in violation of their rights under the due process clause and under the equal protection of the laws clause of the Fourteenth Amendment to the Federal Constitution. They contend that the evidence shows that in arresting the defendants the police officers of the City of Charleston were aiding and assisting the management of S. H. Kress & Company in refusing lunch counter service to the defendants solely on account of their race or color. They further contend that S. H. Kress & Company is "invested with the public interest" and is, therefore, required to provide services "in the manner of State operated facilities of a like nature", and may not segregate or exclude persons on the basis of race or color. There is no merit in the defendants' contentions.

Order of the Charleston County Court

S. H. Kress & Company owns and operates a store on King Street in the City of Charleston. It is common knowledge that it is a five and ten cent store engaged in the business of offering for sale various articles of merchandise. In the conduct of its business, Kress also owns and operates a food and lunch counter in a part of the store premises. S. H. Kress & Company, as other retail stores, opens its doors to the general public and invites the public in to do business. According to the testimony of the store manager, it is the policy of Kress to operate its business in accordance with prevailing local custom, and following such custom, it does not serve Negroes at its lunch counter.

Although a member of the general public has an invitation or implied license to enter a retail store to do business, the proprietor or manager of such store has the right to revoke this license at any time. An invitation to the public to come into a store to buy does not automatically impose upon the store an obligation to sell. A private business always has the right to select its customers and to make such selection on any basis it chooses. A private business is under no compulsion whatsoever to serve everyone who enters and applies for service.

Section 16-386, under which the defendants were found guilty, reads: "Every entry upon the lands of another * * * after notice from the owner or tenant prohibiting such entry, shall be a misdemeanor. * * *" The obvious and sole purpose of this statute is to protect the property owner from trespassers on his property. The statute is directed against all trespassers, regardless of race or color.

"The right of property is a fundamental, natural, inherent, and inalienable right. It is not *ex gratia* from the legislature, but *ex debite* from the Constitution. In fact,

it does not owe its origin to the Constitutions which protect it, for it existed before them. It is sometimes characterized judicially as a sacred right, the protection of which is one of the most important objects of government. The right of property is very broad and embraces practically all incidents which property may manifest." 11 Am. Jur., Constitutional Law, Section 335.

The defendants in this case entered the property of S. H. Kress & Company presumably in the role of customers. They seated themselves at the lunch counter for some five hours and refused the store manager's request that they leave. When they refused this request they became under the law trespassers. There is absolutely no merit in the defendants' contention that their arrest by the City Police constituted State action.

Recently, the Supreme Court of our sister State of North Carolina had before it a case quite similar to the instant case. *State* v. *Avent et al.*, 253 N. C. 580, 118 S. E. (2d) 47. There, as here, the Court was considering a trespass case, or "sit-in demonstration" as such incidents have been termed, which took place in a S. H. Kress & Company store in Durham, North Carolina. The following quotation from that case is appropriate to the case at hand.

"Private rights and privileges in a peaceful society living under a constitutional form of government *like ours* are inconceivable without State machinery by which they are enforced. Courts must act when parties apply to them—even refusal to act is a positive declaration of law—and, hence, there is a fundamental inconsistency in speaking of the rights of an individual who cannot have judicial recognition of his rights. All the State did * * * was to give or create a neutral legal framework in which S. H. Kress & Company could protect its private property from tres-

passers. * * * There is a recognizable difference between State action that protects the plain legal right of a person to prevent trespassers from going upon his land after being forbidden, or remaining upon his land after a demand that they leave, even though it enforces the clear right of racial discrimination of the owner, and State action enforcing covenants restricting the use or occupancy of real property to persons of the Caucasian race. The fact that the State provides a system of courts so that S. H. Kress & Company can enforce its legal rights against trespassers upon its property * * * and the acts of its judicial officers in their official capacities, cannot fairly be said to be State action enforcing racial segregation in violation of the 14th Amendment to the Federal Constitution. Such judicial process violates no rights of the defendants. * * * To rule as contended by defendants would mean that S. H. Kress & Company could enforce its rights against White trespassers alone, but not against Negro trespassers. * * * Surely, that would not be an impartial administration of the law, for it would be a denial to the White race of the equal protection of the law. If a landowner or one in possession of land cannot protect his natural, inherent and constitutional right to have his land free from unlawful invasion by * * * trespassers in a case like this by judicial process as here, because it is State action, then he has no other alternative but to eject them, with a gentle hand if he can, with a strong hand if he must. White people also have constitutional rights as well as Negroes, which must be protected, if our constitutional form of government is not to vanish from the face of the earth."

The customs of the people of a State do not constitute State action within the prohibition of the Fourteenth Amendment. *Williams* v. *Howard Johnson's Restaurant*, 268 F. (2d) 845.

Order of the Charleston County Court

In *Shelley* v. *Kraemer*, 334 U. S. 1, 92 L. Ed. 1161, 3 A. L. R. (2d) 441, the Court said: "Since the decision of this Court in the Civil Rights cases, 109 U. S. 3, 27 L. Ed. 835, 3 S. Ct. 18 (1883), the principle has become firmly embedded in our constitutional law that the action inhibited by the first section of the Fourteenth Amendment is only such action as may fairly be said to be that of the State. That Amendment erects no shield against merely private conduct, however discriminatory or wrongful."

None of the cases cited in the defendants' brief are applicable to the situation before this Court for the reasons already stated.

Although the defendants make no mention of it in their brief, they contend in their grounds for appeal that Section 16-386 is unconstitutional in that it does not require that a person making the demand to leave present documents or other evidence of possessory right sufficient to apprise the defendants of the validity of the demand. This contention is not tenable. The evidence shows very clearly that the manager of S. H. Kress & Company identified himself to the defendants before he requested them to leave the store. No more than that is required under this statute.

All of the defendants' grounds for appeal have been considered, and all are overruled. The defendants have not shown that any of their rights guaranteed by the Fourteenth Amendment to the Federal Constitution have been violated.

The judgments of the Recorder's Court of the City of Charleston are affirmed.

/s/ THOS. P. BUSSEY,
Judge, Ninth Judicial Circuit.

Charleston, South Carolina,
June 26, 1964.

Opinion of Supreme Court of South Carolina

THE STATE OF SOUTH CAROLINA
IN THE SUPREME COURT

CITY OF CHARLESTON,

Respondent,

—v.—

CHRISTOPHER MITCHELL, JOHN BAILEY, JOSEPH GERIDEAU, JAMES GILBERT BLAKE, ANDREW BROWN, ALVIN DELFORD LATTEN, FRED SMALL, CORNELIUS FLUDD, CHARLES BUTLER, FRANCIS JOHNSON, DAVID PAUL RICHARDSON, JOSEPH JONES, ALFRED HAMILTON, HARVEY GANTT, ALLEN COLEY, KENNETH ANDREW GERMAN, CAROLYN JENKINS, ARTHUBEE SINGLETON, JENNIESE BLAKE, DELORES BROWN, ANNETTE GRAHAM, CECILE GORDON, VERNA JEAN MCNEILL and MINERVA BROWN,

Appellants.

Appeal From Charleston County
THOMAS P. BUSSEY, *Judge*

Filed December 13, 1961

REVERSED IN PART;
AFFIRMED IN PART

Moss, *A.J.*:

The twenty-four appellants, all of whom are Negro high school students, were arrested on April 1, 1960, and charged with the violation of Section 16-386, as amended, of the

1952 Code of Laws of South Carolina, and Section 33-39, 1952 Code of the City of Charleston.

The appellants were tried before the City Recorder in the police court of the City of Charleston, on April 19, 1960. Each of the appellants was found guilty of both charges and sentenced to pay a fine of Fifty & 00/100 ($50.00) Dollars or to imprisonment for fifteen days on each offense, the sentences in each case to run concurrently. The conviction of each of the appellants was sustained by the Circuit Court. The appellants gave timely notice of intention to appeal to this Court.

The questions involved in this appeal may be summarized as follows: (1) Did the court err in refusing to hold that the warrants charging the appellants with the violation of Section 16-386, as amended of the 1952 Code of Laws of South Carolina, and of Section 33-39, 1952 Code of the City of Charleston, were vague, indefinite and uncertain and do not plainly and substantially set forth the offenses charged. (2) Did the testimony fail to establish the *corpus delicti* or prove a *prima facie* case. (3) Did the court err in refusing to hold that under the facts of these cases, the arrests and convictions of the appellants were in furtherance of a custom of racial segregation in violation of the Fourteenth Amendment to the Constitution of the United States. Under this question the appellants assert that the enforcement of segregation was by State action and that they were unwarrantedly penalized for exercising their freedom of expression.

The first question for determination is whether the appellants' motion to quash and dismiss the warrants should have been sustained upon the ground that the charge contained in each of said warrants was too vague, indefinite and uncertain, in that they do not substantially apprise

them of the offenses charged. The appellants were tried on warrants which were based on an affidavit of the Chief of Police of the City of Charleston. In the first affidavit he avers that the appellants, on April 1, 1960, "did unlawfully, knowingly, and willfully commit a trespass, in that they did refuse to leave the premises and property of S. H. Kress & Company, having been requested and ordered to leave, vacate and remove themselves from said premises, all in violation of Title 16, Section 386, of the Code of Laws of South Carolina for 1952, as amended, and against the peace and dignity of the said State." The second warrant charged that the appellants, on April 1, 1960, "did unlawfully, knowingly, and willfully hinder, resist, oppose and interfere with an employee of the City of Charleston, namely, William F. Kelly, Chief of Police, in the discharge of his official duties, in that they did refuse to leave the premises and property of S. H. Kress & Company after being ordered and requested to do so by William F. Kelly, Chief of Police, all in violation of Section 33-39 of the Code of the City of Charleston, 1952, and against the peace and dignity of said State."

The pertinent portion of Section 16-386, as amended, of the 1952 Code of Laws of South Carolina, is as follows:

> "Every entry upon the * * * lands of another, after notice from the owner or tenant prohibiting such entry, shall be a misdemeanor and be punished by a fine not to exceed one hundred dollars, or by imprisonment with hard labor on the public works of the county for not exceeding thirty days. When any owner or tenant of any lands shall post a notice in four conspicuous places on the borders of such land prohibiting entry thereon, a proof of the posting shall be deemed and taken as notice conclusive against the person making entry as aforesaid for the purpose of trespassing."

Section 33-39, of the 1952 Code of the City of Charleston, provides:

> "It shall be unlawful for any person to assault, resist, hinder, oppose, molest or interfere with any employee of the City or of any department or board thereof, or any officer or employee of the police department of the City, in discharge of official duties, under penalty of fine of not less than twenty dollars or not more than one hundred dollars or imprisonment not exceeding 30 days."

Article 1, Section 18, of the 1895 Constitution of this State, provides that in all criminal prosecutions the accused shall have the right "to be fully informed of the nature and cause of the accusation." This Constitutional right is set forth with reference to criminal prosecutions in a Magistrate's Court in Section 43-111 of the 1952 Code of Laws of South Carolina, as follows: "All proceedings before magistrates in criminal cases shall be commenced on information under oath, plainly and substantially setting forth the offense charged, upon which, and only which, shall a warrant of arrest issue." Section 43-112, of the 1952 Code, provides that the information may be amended at any time before trial. Proceedings before a magistrate are summary in nature. Section 43-113 of the 1952 Code of Laws. We should point out that Section 15-901 of the 1952 Code of Laws gives to the mayor or intendant of the cities and towns of this State all the powers and authority of magistrates in criminal cases for offenses committed within the corporate limits and within the police jurisdiction of the respective cities and towns, as is contained in Section 43-111 of the 1952 Code. Section 15-1561 of the Code gives to the recorder of the police court of the City of Charleston all the powers, duties and jurisdiction of a magistrate.

In the case of State v. Randolph, et al., 239 S. C. 79, 121 S. E. (2d) 349, which prosecution originated in a Magistrate's Court, we summarized the rule concerning the right of an accused to be fully informed of the offense charged against him. We said:

> "Proceedings before a magistrate are summary in nature. Section 43-113 of the 1952 Code. His jurisdiction to try criminal cases is confined to minor offenses. Many of our magistrates are without legal training. In the preparation of warrants they are not required to conform to the technical precision required in indictments. Duffie v. Edwards, 185 S. C. 91, 193 S. E. 211. But it does not follow that the accused may be denied those fundamental rights essential to a fair trial, among which is the right to be informed of the nature of the offense charged against him. In McConnell v. Kennedy, 29 S. C. 180, 7 S. E. 76, 80, the Court stated that the manifest object of the statute now forming Section 43-111 of the 1952 Code was 'to require that the offense with which a party was charged should be so set forth, plainly and substantially, as would enable the party accused to understand the nature of the offense with which he was charged, so that he might be prepared to meet the charge at the proper time.' In Town of Honea Path v. Wright, 194 S. C. 461, 9 S. E. (2d) 924, 927, the Court said: 'Without doubt, the administration of the law, and the rights of persons charged with crime can best be served by a due observance of statutory requirements. It is the constitutional right of a person charged with a criminal offense to be fully informed of the nature and cause of the accusation. Article 1, Section 18 of the Constitu-

tion.' In Town of Mayesville v. Clamp, 149 S. C. 346, 147 S. E. 455, 457, Justice Blease, later Chief Justice, stated in a concurring opinion: 'While an accused may be arrested on a warrant that does not fully inform him of the nature and cause of the accusation, he may, when he is brought to trial, demand the information he is entitled to have under the provisions of Section 18 of Article 1.'"

In the recent case of City of Greenville v. Peterson, et al., —— S. C. ——, —— S. E. (2d) ——, (filed November 10, 1961), the appellants there were arrested, charged and convicted of trespass, in violation of Section 16-388, as amended, of the 1952 Code of Laws. They contended in this Court that the warrant should have been dismissed upon the ground that the charge contained therein was too indefinite and uncertain as to apprise them of the nature and cause of the accusation against them. In the Peterson case the appellants relied upon the authority of State v. Randolph, supra, as they do here, where this Court held that it was error to refuse a motion to make the charge more definite and certain in a warrant charging a breach of the peace. We pointed out in the Randolph case that a breach of the peace embraces a variety of conduct and the appellants there were entitled to be given such information as would enable them to understand the nature of the offense. As was said in the Peterson case "This is not true in the instant case where the charges were definite, clear and unambiguous; further no motion was made to require the prosecution to make the charge more definite and certain. There is no merit in this contention." The wording of the warrants here was such as to apprise the appellants of the offenses with which they were charged. They were

fully informed of the nature and the cause of the accusation against them in accordance with Article 1, Section 18 of the 1895 Constitution of this State, and Section 43-111 of the 1952 Code of Laws. The first warrant charges that on a day certain the appellants committed a trespass in refusing to leave the premises and property of S. H. Kress & Company, having been requested and ordered to vacate and remove themselves from said premises. This warrant then charged such to be a violation of a specific section of the Code. The second warrant heretofore referred to, likewise fully informed the appellants of the nature and cause of the accusation against them. The warrants against the appellants were not vague, indefinite and uncertain. This exception of the appellants is overruled.

S. H. Kress & Company is a private corporation, owning and operating a variety store on King Street in the City of Charleston, South Carolina. Located in said store is a food and lunch counter owned and operated by this private corporation. The record shows that on April 1, 1960, that the appellants entered the premises of S. H. Kress & Company at about 10:45 A. M. and seated themselves at the lunch counter. Shortly after they occupied seats at the lunch counter, such was closed for business. The appellants remained seated at the lunch counter until about 4:30 P. M. at which time the manager of the store approached the group, told them who he was, and requested them to leave the store premises. The request of the manager was ignored and he repeated the request a second time, but the appellants remained seated. Immediately following the two requests of the manager for the appellants to leave the premises of S. H. Kress & Company, William F. Kelly, Chief of the Charleston Police Department, ordered the appellants to leave the building. Upon their refusal to leave

they were placed under arrest. The evidence in the record discloses that the city police department had received information that a bomb was to be exploded in the Kress building. It was after this report was received by the Chief of Police, and such was communicated to the manager of the store, that not only the manager but the Chief of Police requested the appellants to leave and vacate the said store. The Chief of Police testified, "I was urging them for their safety and all others concerned to leave as quickly as possible from the building, that it was urgent that they do so. I then repeated it and said pretty well the same words as I said the first time. Receiving no reply, and in fact no one even turned at that particular point, I asked for their spokesman in the group. No one signified that he or she was. I then told them, advised them, that as Chief of Police of the City of Charleston inasmuch as they have failed to comply with the request of Mr. Watts, Manager of Kress's, it hereby became necessary for me to place them under arrest."

The appellants assert that Section 16-386 of the 1952 Code of Laws has no application since it only makes criminal an entry upon the premises of another "after notice from the owner or tenant prohibiting such entry."

The State of North Carolina has two trespass statutes which have been recently construed by the Supreme Court of that State in connection with "sit-in demonstrations". Section G S 14-134, of the General Statutes of North Carolina, provides: "If any person after forbidden to do so, shall go or enter upon the lands of another, without a license therefor, he shall be guilty of a misdemeanor, * * *" Section 14-126 of the General Statutes of said State, provides: "No one shall make entry into any lands and tenements, or term for years, but in case where entry is given by law;

and in such case, not with strong hand nor with multitude of people, but only in a peaceable and easy manner; and if any man do the contrary, he shall be guilty of a misdemeanor."

In the case of State v. Clyburn, 247 N. C. 455, 101 S. E. (2d) 295, it appears that the appellants there, who were Negroes, entered the store of the Royal Ice-Cream Company and proceeded to the portion of the store set apart for white patrons. They attempted to make a purchase of ice cream and the clerk refused to serve them. Upon their refusal to vacate the premises, they were charged with trespass, in that they did unlawfuly refuse to leave the premises reserved for members of the white race. Upon conviction and appeal to the Supreme Court of North Carolina, the appellants contended that the trespass statutes above referred to had no application, since the statutes only make criminal an entry after being forbidden. The contention of the appellants was rejected and the Supreme Court of North Carolina, in disposing of the appellants' contention, said:

> "What is the meaning of the word 'enter' as used in the statute defining a criminal trespass? The word is used in G. S. section 14-126 as well as G. S. section 14-134. One statute relates to an entry with force; the other to a peaceful entry. We have repeatedly held, in applying G. S. section 14-126, that one who remained after being directed to leave is guilty of a wrongful entry even though the original entrance was peaceful and authorized. State v. Goodson, supra; State v. Fleming, 194 N. C. 42, 138 S. E. 342; State v. Robbins, 123 N. C. 730, 31 S. E. 669; State v. Webster, 121 N. C. 586, 28 S. E. 254; State v. Gray, 109 N. C. 790, 14 S. E. 55; State v. Talbot, 97 N. C. 494, 2 S. E. 148. The word

'entry' as used in each of these statutes is synonymous with the word 'trespass'. It means an occupancy or possession contrary to the wishes and in derogation of the rights of the person having actual or constructive possession. Any other interpretation of the word would improperly restrict clear legislative intent."

In the case of State v. Avent, 253 N. C. 580, 118 S. E. (2d) 47, it appears that the appellants entered the store of S. H. Kress & Company, in the City of Durham, North Carolina, and seated themselves at the lunch counter. They were asked to leave and upon their refusal, they were arrested and charged with trespassing. In affirming the conviction of the appellants, the Court reaffirmed its holding in State v. Clyburn, supra, saying:

"This statute is also color blind. Its purpose is 'to protect possession only.' State v. Baker, supra. We have repeatedly held in applying G. S. section 14-126 that a person who remains on the land of another after being directed to leave is guilty of a wrongful entry even though the original entrance was peaceful. The word 'entry' as used in each of these statutes is synonymous with the word 'trespass.'"

Our statute, Section 16-386, provides that every entry upon the lands of another, "after notice from the owner or tenant prohibiting such entry," has the same meaning as the North Carolina Statute, Section 14-134 of the General Statutes, which provides if any person after "forbidden to do so shall go or enter upon the lands of another" shall be guilty of a misdemeanor. The logic and reasoning of the North Carolina Supreme Court, in construing the trespass statute of that State, convinces us that the same rule should

be applied in the construction of the trespass statute here under consideration. We think the proper interpretation of our trespass statute requires a rejection of the position asserted by the appellants.

It has been soundly held that although an entry on land may be effected peaceably or even with the permission of the owner, the person making such entry may by reason of subsequent conduct while there be held to be guilty of a forcible trespass. 52 Am. Jur., Trespass, Section 84, at page 895. State v. Tyndall, 192 N. C. 559, 135 S. E. 451, 47 A. L. R. 596.

In the case of State v. Williams, 76 S. C. 135, 56 S. E. 783, this Court approved the following charge made by the trial Judge:

> "I charge you further, as matter of law, that if an officer goes out to arrest another, and even the prosecutor in the case goes along with him, as long as he behaves himself and takes no part in it, he is not a trespasser until he is ordered off of the man's premises he goes on. If he is ordered off, then it is his duty to go, and if he does not go off, then the owner of the premises has the right to use whatever amount of force is necessary to put him off. He has no right to use any unnecessary force, however."

In the case of Shramek v. Walker, 152 S. C. 88, 149 S. E. 331, this Court quoted with approval from 2 R. C. L., 559, the following,

> "It is a well-settled principle that the occupant of any house, store, or other building, has the legal right to control it, and to admit whom he pleases to enter and remain there, and that he also has the right to expel from the room or building any one who abuses

the privilege which has been thus given him. Therefore, while the entry by one person on the premises of another may be lawful, by reason of express or implied invitation to enter, his failure to depart, on the request of the owner, will make him a trespasser and justify the owner in using reasonable force to eject him. The most common cases involving the right of an owner to eject one from his premises who entered lawfully, are those where a person enters a hotel or business place or the conveyance of a common carrier and while therein forfeits his right to remain by his misconduct or failure to comply with the reasonable rules and regulations. On the forfeiture of his right he becomes a common trespasser and may be forcibly ejected on failure to depart after a request to do so. See also 5 C. J., 745." See also 9 A. L. R. 379; 33 A. L. R. 421.

The appellants assert that the court erred in refusing to hold that their arrests and convictions were in furtherance of a custom of racial segregation in violation of the Fourteenth Amendment to the United States Constitution. It is also asserted that enforcement of segregation in this case was by State action within the meaning of such Fourteenth Amendment.

The appellants assert that since the store of S. H. Kress & Company was open to the public that they were there as business invitees and the refusal to serve them, because of their race, was a denial of their constitutional rights. The appellants do not attack Section 16-386 of our Code as being unconstitutional but contend that their rights were abridged in its application, in that they were invitees and were refused service because of their race. They assert

that the use of judicial process here constitutes State action to enforce racial segregation, in violation of their rights under the due process and equal protection clause of the Fourteenth Amendment to the Federal Constitution, and that Section 16-386 of our Code is being unconstitutionally applied for the same purpose.

Section 16-386 of our Code is not a racial segregation one. It forbids any person, irrespective of his race or color, to make entry upon the lands of another after notice from the owner or tenant prohibiting such entry. There is no statute in this State which forbids discrimination by the owner of a restaurant of people on account of race or color. In the absence of a statute forbidding discrimination based on race or color, the rule is well established that an operator of a privately owned restaurant, privately operated in a privately owned building, has the right to select the clientele he will serve and to make such selection based on color or race if he so desires. This rule has been repeatedly recognized by the Appellate Courts of this country. State v. Clyburn, 247 N. C. 455, 101 S. E. (2d) 295, and State v. Avent, 253 N. C. 580, 118 S. E. (2d) 47, and the cases therein cited. Randolph v. Commonwealth, 202 Va. 661, 119 S. E. (2d) 817; City of Greenville v. Peterson, et al., supra. The holding in these cases is based upon the principle that the Fourteenth Amendment "erects no shield against mere private conduct, however discriminatory or wrongful", Shelley v. Kraemer, 334 U. S. 1, 68 S. Ct. 836, 92 L. Ed. 1161, 3 A. L. R. (2d) 441, and that in the absence of statute the operator of a privately owned business may accept some customers and reject others on purely personal grounds. In the case of Alpaugh v. Wolverton, 184 Va. 943, 36 S. E. (2d) 906, this principle was applied in the operation of a privately owned restaurant.

In the case of State v. Avent, 253 N. C. 580, 118 S. E. (2d) 47, the North Carolina Supreme Court held that Negro and white students who refused, in the presence of a police officer, to leave the lunch counter of S. H. Kress & Company's privately owned variety store at the order of the manager were guilty of wrongful entry and trespass, and the police officer had the duty to arrest them, and the arrest and judicial process against such students did not constitute State action to enforce racial segregation in violation of the Fourteenth Amendment to the Federal Constitution. In disposing of the contention of the appellants in the Avent case, the North Carolina Supreme Court, in refusing to upset the convictions of the appellants on the ground that their arrest and trial for trespass constituted State action within the meaning of the Fourteenth Amendment, said:

> "Private rights and privileges in a peaceful society living under a constitutional form of government like ours are inconceivable without State machinery by which they are enforced. Courts must act when parties apply to them—even refusal to act is a positive declaration of law—, and, hence, there is a fundamental inconsistency in speaking of the rights of an individual who cannot have judicial protection of his rights. All the State did in these cases was to give or create a neutral legal framework in which S. H. Kress and Company could protect its private property from trespassers upon it in violation of G. S. section 14-134 and G. S. section 14-126. There is a recognizable difference between State action that protects the plain legal right of a person to prevent trespassers from going upon his land after being forbidden, or remaining upon his land after a demand that they leave, even

though it enforces the clear legal right of racial discrimination of the owner, and State action enforcing covenants restricting the use or occupancy of real property to persons of the Caucasian race. The fact that the State provides a system of courts so that S. H. Kress and Company can enforce its legal rights against trespassers upon its private property in violation of G. S. section 14-134 and G. S. section 14-126, and the acts of its judicial officers in their official capacities, cannot fairly be said to be State action enforcing racial segregation in violation of the 14th Amendment to the Federal Constitution. Such judicial process violates no rights of the defendants guaranteed to them by Article I, section 17, of the State Constitution. To rule as contended by defendants would mean that S. H. Kress and Company could enforce its rights against White trespassers alone, but not against Negro trespassers and White and Negro trespassers in company. Surely, that would not be an impartial administration of the law, for it would be a denial to the White race of the equal protection of the law. If a land owner or one in possession of land cannot protect his natural, inherent and constitutional right to have his land free from unlawful invasion by Negro and White trespassers in a case like this by judicial process as here, because it is State action, then he has no other alternative but to eject them with a gentle hand if he can, with a strong hand if he must. * * * "

It plainly appears to us from the evidence that the appellants violated Section 16-386, as amended, of the 1952 Code, in that they did unlawfully, knowingly and willfully

commit a trespass by refusing to leave the premises of S. H. Kress & Company after being requested so to do. We quote the following from the case of Randolph v. Commonwealth, 202 Va. 661, 119 S. E. (2d) 817:

> "The defendant next contends that when the owner of the restaurant, through its employee, procured the warrant for the defendant's arrest, this constituted State action to enforce a discriminatory rule or regulation of the restaurant contrary to the provisions of the Fourteenth Amendment. A similar argument was advanced and rejected in State v. Clyburn, supra, 101 S. E. (2d) at page 299; State v. Avent, supra, 118 S. E. (2d) at page 54; Griffin v. Collins, supra, 187 F. Supp. at page 153, 154. See also, 47 Virginia Law Review 105, 119. Here the purpose of the judicial process is not to enforce a rule or regulation of the operator of the restaurant. Its purpose is to protect the rights of the proprietor who is in lawful possession of the premises and to punish the trespasser, irrespective of his race or color. See Hall v. Commonwealth, supra, 188 Va. 72, 49 S. E. (2d) 369."

The fact that the State of South Carolina provides a system of courts where S. H. Kress & Company can enforce its legal rights against trespassers upon its private property in violation of Section 16-386, as amended, of the Code, and the acts of its judicial officers in their official capacities, does not constitute State action enforcing racial segregation in violation of the Fourteenth Amendment to the Constitution of the United States.

The appellants also contend that their convictions should be reversed by this court because the action of the lower court was an interference with their constitutional rights

of free speech guaranteed to them by the Fourteenth Amendment. It has been soundly held that freedom of speech or expression is not an absolute right. It must be exercised at proper times and places. Kovacs v. Cooper, 336 U. S. 77, 69 S. Ct. 448, 93 L. Ed. 513, 10 A. L. R. (2d) 608. However, the appellants had no constitutional right to exercise their right of free speech as trespassers in the store of Kress & Company in violation of Section 16-386 of the Code. State v. Avent, supra. This exception of the appellants is overruled.

The next question for determination is whether there was any evidence to support the convictions of the appellants for a violation of Section 33-39 of the Code of the City of Charleston.

This ordinance makes it unlawful for any person to assault, resist, hinder, oppose, molest, or interfere with any employee of the * * * police department of the city, in discharge of official duties. It appears from the evidence that the manager of the store of Kress & Company twice requested the appellants to leave the store premises. Immediately following this, the Chief of Police of the City of Charleston made a similar request urging the appellants, for their own safety, to leave the premises. The appellants declined or failed to immediately comply with the request of the Chief of Police. There is testimony that the Chief of Police had received information that a bomb was to be exploded in the Kress building. However, the testimony does not show that this information was communicated to the appellants in connection with the request of the Chief of Police that they vacate the premises. As a matter of fact, the Chief of Police testified that the appellants were arrested for their failure to vacate the premises of Kress store when requested so to do by the manager. It was also

testified that after the manager requested the appellants to leave the store that they did "nothing" and that when the Chief of Police requested them to leave the store, they did "nothing", but when he told them that they were under arrest, the appellants "all stood up". It was testified that the appellants were not discourteous, did not disobey any order when they were placed under arrest, and they were not loud or boisterous in any way, and the appellants left the stofe in company of the officers without causing any trouble.

In affirming the convictions of the appellants, the Circuit Court held that the act of trespass was final and complete before the entirely separate act "of interference with a police officer in the discharge of his duty." It thus appears that the Circuit Judge held that the appellants were guilty of a violation of the above Code because they interfered with the Chief of Police of the City of Charleston in the discharge of his official duty, in that they "did refuse to leave the premises and property of S. H. Kress & Company after being ordered and requested to do so by" said Chief of Police. Did the act of the appellants in doing "nothing" and refusing to leave the premises in question, after being ordered and requested to do so, amount to an unlawful interference by them of the said Chief of Police?

In 47 C. J. S., at page 83, the term "interfere" has been said to import action, not mere inaction, an active rather than a passive condition, and has been defined as meaning to interpose, to prevent some action, sometimes in a bad sense to intermeddle, to check or hamper, and, specifically to do something which hinders or prevents or tends to prevent the performance of legal duty. In its broadest aspects "interfere" bears the significance of "disarrange", "disturb", "hinder".

In State v. Estes, 185 N. C. 752, 117 S. E. 581, the defendant was convicted on an indictment charging that he unlawfully and willfully did resist, hinder, delay, obstruct and interfere with an officer of the board of health in the discharge of his duty as such. It appears from the evidence in the cited case that the health officer went to the store of the defendant for the purpose of enforcing certain statutory requirements in regard to toilet facilities in the store which affected public health. The defendant used abusive and profane language towards the officer but did not get up from his desk where he was seated nor did he strike or offer to strike the officer and made no demonstration of violence whatever. In construing the North Carolina statute, which contains the words "willfully interfere with or obstruct" an officer in the discharge of his duty, the Court, in granting a new trial, said:

> "To 'interfere' is to check or hamper the action of the officer, or to do something which hinders or prevents or tends to prevent the performance of his legal duty; and to 'obstruct' signifies direct or indirect opposition or resistance to the lawful discharge of his official duty. • • • •"

It appears to us that the conduct of the appellants in refusing obedience to the request of the Chief of Police of the City of Charleston was merely inaction on their part and did not constitute interference with said officer in the discharge of his official duty. We think the Court was in error in refusing to so hold.

What we have heretofore said disposes of the question of whether the evidence establishes the *corpus delicti* or proves a *prima facie* case against the appellants. We do

not pass upon the question of whether this issue was properly before us for consideration.

It is the judgment of this Court that the convictions of the appellants for violation of Section 16-386, as amended, of the 1952 Code of Laws of South Carolina is affirmed, and the convictions of the appellants for a violation of Section 33-39 of the 1952 Code of Laws of the City of Charleston is reversed and remanded for entry of a judgment of acquittal.

Affirmed in part and reversed in part.

TAYLOR, C.J., OXNER, LEGGE and LEWIS, JJ., concur.

IN THE

SUPREME COURT OF SOUTH CAROLINA

CITY OF CHARLESTON,

Respondent,

—v.—

MITCHELL, *et al.*,

Appellants.

Order of Denial of Petition for Rehearing

(Endorsed on back of Petition for Rehearing)

Petition Denied.

Filed: January 8, 1962

s/ C. A. TAYLOR C. J.

s/ G. DEWEY OXNER A. J.

s/ LIONEL K. LEGGE A. J.

s/ JOSEPH R. MOSS A. J.

s/ J. WOODROW LEWIS A. J.

Office-Supreme Court, U.S.
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MAY 18 1962
JOHN F. DAVIS, CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM, 1962

No 946

CHRISTOPHER MITCHELL, JOHN BAILEY, JOSEPH GERIDEAU, JAMES GILBERT BLAKE, ANDREW BROWN, ALVIN DELFORD LATTEN, FRED SMALL, CORNELIUS FLUDD, CHARLES BUTLER, FRANCIS JOHNSON, DAVID PAUL RICHARDSON, JOSEPH JONES, ALFRED HAMILTON, HARVEY GANTT, ALLEN COLEY, KENNETH ANDREW GERMAN, CAROLYN JENKINS, ARTHUREE SINGLETON, JENNIESE BLAKE, DELORES BROWN, ANNETTE GRAHAM, CECILE GORDON, VERNA JEAN McNEIL, MINERVA BROWN, PETITIONERS,

versus

CITY OF CHARLESTON, RESPONDENT

BRIEF OPPOSING PETITION FOR WRIT OF CERTIORARI

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City of Charleston,
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The R. L. Bryan Company, Legal Printers, Columbia, S. C.

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1961

No. 846

CHRISTOPHER MITCHELL, JOHN BAILEY, JOSEPH GERIDEAU, JAMES GILBERT BLAKE, ANDREW BROWN, ALVIN DELFORD LATTEN, FRED SMALL, CORNELIUS FLUDD, CHARLES BUTLER, FRANCIS JOHNSON, DAVID PAUL RICHARDSON, JOSEPH JONES, ALFRED HAMILTON, HARVEY GANTT, ALLEN COLEY, KENNETH ANDREW GERMAN, CAROLYN JENKINS, ARTHUREE SINGLETON, JENNIESE BLAKE, DELORES BROWN, ANNETTE GRAHAM, CECILE GORDON, VERNA JEAN McNEIL, MINERVA BROWN, PETITIONERS,

versus

CITY OF CHARLESTON, RESPONDENT

BRIEF OPPOSING PETITION FOR WRIT OF CERTIORARI

STATEMENT

On April 1st, 1960, at about 10:45 o'clock, a. m., Petitioners entered the premises of S. H. Kress & Company, a private business corporation, in the City of Charleston, State of South Carolina, and seated themselves at the lunch counter (R. 10, 11). The Petitioners were not served by S. H. Kress & Company and remained seated at the lunch counter until about 4:30 o'clock, p. m., when they were requested to leave the establishment by the manager, who had properly identified himself (R. 11). The request was

ignored, and was repeated a second time, but Petitioners continued to sit and refused to leave the premises (R. 12). Chief William F. Kelly then advised them that inasmuch as they had failed to comply with the request of the manager of Kress, it was necessary to place them under arrest (R. 24, 25). The evidence discloses that the City Police Department had received information that a bomb was going to go off in the Kress building (R. 21, 23). It was after this report was received that the Petitioners were told to leave the premises of Kress by the Management of Kress (R. 11, 23, 24).

Petitioners were charged with violating Title 16, Section 386, of the Code of Laws of South Carolina for 1952, as amended, and Section 33-39 of the Code of the City of Charleston for 1952.

Petitioners were tried before the City Recorder without a jury and found guilty of both charges and each sentenced to pay fines of Fifty ($50.00) Dollars or serve fifteen (15) days in jail on each offense; the sentences in each case to run concurrently (R. 61, 71) (Error at R. 56).

The judgments of the City Recorder were affirmed by the Court of General Sessions for Charleston County on June 26th, 1961 (R. 77).

The Petitioners appealed to the Supreme Court of South Carolina, which affirmed the judgment of conviction of trespass and violation of Title 16, Section 386, of the 1952 Code of Laws of South Carolina, as amended, and reversed the judgment of conviction for the offense of interfering with a police officer under Section 33-39 of the Code of the City of Charleston for 1952. The Supreme Court of South Carolina denied re-hearing on January 8th, 1962.

REASONS FOR DENYING THE WRIT

I

Petitioners committed criminal trespass on private property in South Carolina and were properly arrested and subsequently convicted, none of which violated their rights under the Fourteenth Amendment. That the interpretation given the Trespass Statute by the South Carolina Supreme Court is in accordance with the interpretation given historically in this country of similar Trespass Statutes.

The Petitioners were staging a so-called "sit-in", but they were not arrested for merely sitting, demonstrating or watching, or because they were Negroes. They were arrested only after the manager of a private business had asked them to leave the premises, and they failed or refused to do so. They thereupon became trespassers and were arrested and convicted as such. Petitioners apparently contend that they were engaged in the exercise of free expression by verbal and non-verbal requests for nondiscriminatory lunch counter service. The record shows that their actions were non-verbal, and the question of free speech is not involved. Petitioners also contend that the Statute under which they were charged is vague and indefinite in its terms and did not provide reasonable notice under which convictions could be obtained. In fact, every action of the Petitioners suggests that they intended and expected to be arrested for their actions and would, in fact, have been disappointed had they not been. They cannot under these circumstances complain that they had no notice.

The warrant for trespass states with particularity that the Petitioners commited a trespass "in that they did fail and refuse to vacate the premises of S. H. Kress & Company when ordered to do so, all in violation of Title 16, Section 386, of the Code of Laws of South Carolina for 1952, as Amended . . .". Certainly this language is un-

ambiguous and certainly the Petitioners could not have doubted the nature and cause of the accusations against them. Section 43-111 of the Code of Laws for South Carolina for 1952, which is applicable to Municipal and Recorders Courts, has not been interpreted so as to require technical accuracy in stating the offense. *Elletson v. Dixie Home Stores*, 231 S. C. 565, 99 S. E. (2d) 384; *McConnell v. Kennedy*, 29 S. C. 180, 7 S. E. 76; *McCall v. Alexander*, 81 S. C. 131, 61 S. E. 1106; *Duffie v. Edwards*, 185 S. C. 91, 193 S. E. 211; *State v. Randolph et al.*, 239 S. C. 79, 121 S. E. (2d) 349. Section 43-113 of the Code of Laws of South Carolina for 1952 provides that proceedings before a magistrate are summary in nature. Section 15-1561 of the Code of Laws of South Carolina for 1952 gives the Recorder of the Police Court of the City of Charleston all powers, duties and jurisdiction of a magistrate.

Petitioners are apparently attempting to raise the question as to whether the trespass conviction can stand under the facts proven, in view of the wording of the Statute which uses the phrase "after notice from the owner or tenant prohibiting such entry".

In *State v. Bradley*, 136 S. C. 465, 120 S. E. 244, South Carolina's highest Court stated as follows:

> "In *State v. Lightsey*, 43 S. C. 114, 20 S. E. 975, the presiding judge charged the jury: And on 'the land away from his castle he has not the same right there that he has in his home. . . . If a man warns another off his place, and that man comes on it (or refuses to leave, we add), he is guilty of a crime, a misdemeanor, and for that misdemeanor he may be tried in court'."

A unanimous Court stated unequivocally in the above quotation that if a man warns another off his place and that man refuses to leave, he is guilty of a crime, a misdemeanor. This view of our trespass statute is generally

followed where the question has arisen under similar statutes.

Our sister State of North Carolina, in *State v. Clyburn*, 101 S. E. (2d) 295, had before it the identical question involved here. The Defendants in the *Clyburn case* contended that the North Caroliaa statute had no application since it only made criminal an entry after being forbidden. The Court, following numerous previous decisions in North Carolina, held that one who remained after being directed to leave was guilty of wrongful entry, even though the original entrance was peaceful and authorized. The Court stated as follows:

> "Does the statute, G. S., Sec. 14-134, apply to such a trespasser? Defendants maintain it has no application since it only makes criminal an entry after being forbidden. The merit, if any, in the position taken is determined by ascertaining the wrong condemned. The denomination of the criminal act and the historic interpretation given to the words used to define the act provide the answer to the question. The statute, first enacted in 1866, is entitled 'An Act To Prevent Wilful Trespasses On Land, and Stealing Any Kind of Property Therefrom'. It is now grouped with other statutes relating to wrongs done to the owners of real estate in a sub-chapter of our criminal laws entitled 'Trespasses to Land and Fixtures'. Looking at the titles, it is apparent the Legislature intended to prevent the unwanted invasion of the property rights of another. *State v. Cooke, supra; State v. Baker*, 231 N. C. 136, 56 S. E. (2d) 424: It is not the act of entering or going on the property which is condemned: it is the intent or manner in which the entry is made that makes the conduct criminal. A peaceful entry negatives liability under G. S. Section 14-126. An entry under a bona fide claim of rights avoid criminal responsibility under G. S. Section 14-134 even though civil liability may remain. *State v. Faggart*, 170 N. C. 737, 87 S. E. 197; *State v. Wells*, 142 N. E. 590, 55 S. E. 210; *State*

v. Fisher, 109 N. C. 817, 13 S. E. 878; *State v. Crosset*, 81 N. C. 579.

What is the meaning of the word 'enter' as used in the statute defining a criminal trespass? The word is used in G. S. Sec. 14-126 as well as G. S. Sec. 14-134. One statute relates to an entry with force; the other to a peaceful entry. We have repeatedly held, in applying G. S. Section 14-126 that one who remained after being directed to leave is guilty of a wrongful entry even though the original entrance was peaceful and authorized. *State v. Goodson, supra; State v. Fleming*, 194 N. C. 42, 138 S. E. 342; *State v. Robbins*, 123 N. C. 730, 31 S. E. 669; *State v. Webster*, 121 N. C. 586, 28 S. E. 254; *State v. Gray*, 109 N. C. 790, 14 S. E. 55; *State v. Talbot*, 97 N. C. 494, 2 S. E. 148. The word 'entry' as used in each of these statutes is synonymous with the word 'trespass'. It means an occupancy or possession contrary to the wishes and in derogation of the rights of the person having actual or constructive possession. Any other interpretation of the word would improperly restrict clear legislative intent. The charge as given is the correct interpretation of the statute."

See also *State v. Avent*, 118 S. E. (2d) 47 (N. C.), page 53.

An annotation in 49 A. L. R., page 597, deals with the criminal offense of forcible detainer or trespass, where entry was peaceable, and states in part as follows:

"The few cases in which the question of the effect of a peaceable entry in prosecution of forcible entry or trespass has arisen, with the exception of a few earlier North Carolina cases hereinafter referred to, support the holding in the reported cases (*State v. Tyndall*, *ante*, 596) to the effect that although the entry on lands may be effected peaceably, and even with the permission of the owner, yet, if after going upon the premises of another the defendant uses violent or abusive language, and commits acts such as are reasonably calculated to intimidate or lead to a breach of the peace, he will be guilty of a forcible trespass."

While there is no abusive language present in the cases before this Court, the principle of notice after entry is relevant to the issue attempted to be raised by Appellants. Numerous cases are cited in the A. L. R. annotation from North Carolina, and the following Pennsylvania cases: *Cole v. Reece*, 47 Pa. Super. Ct. 212; *Com. v. Johnston*, 71 Pa. Super. Ct. 548. Also see 52 Am. Jur., Trespass, Section 84, page 895, where the following is found:

> "A mere invasion of private property without any disturbance of the peace is not a crime. On the other hand, although an entrance on land may be effected peaceably or even with the permission of the owner, a person making such entry may by reason of subsequent conduct while there be held guilty of a forcible trespass."

II

The Trespass Statute of South Carolina applies to all citizens equally, discriminates against no group or individual, is designed to protect property rights of all citizens of all races and does not violate the Equal Protection and Due Process Clauses of the Fourteenth Amendment to the Constitution of the United States.

The trespass statute under which Petitioners were arrested, tried and convicted is not racial in origin or in enforcement. It has been part of the statutory law of South Carolina since about 1866.

The Petitioners apparently seek in this case to avoid or ignore the well established principle that a private business has a perfect right to select its customers and to make such selection on any basis it chooses. *State v. Avent* (N. C.), 118 S. E. (2d) 47; *Williams v. Howard Johnson's Restaurant*, 4th Cir., 268 F. (2d) 845; *Slack v. Atlantic White Tower System, Inc.*, 284 F. (2d) 746; *Alpaugh v. Wolverton* (Va.), 36 S. E. (2d) 906. Such right is embraced within the broad rights which characterize the ownership of pri-

vate property. In denying to the Petitioners service at its lunch counter, it is true that S. H. Kress & Co. was voluntarily following a prevailing custom of racial segregation. By no means is Kress or any other business establishment required or compelled to follow such custom. It is, after all, a free choice, exercised by the owner of private property as a matter of right.

The record is clear that the Petitioners violated local custom by seeking service at the Kress lunch counter. However, they were not arrested by the City of Charleston for seeking such service. They were arrested after they refused to leave the private property of Kress. By their act of refusal and their failure to leave, they became trespassers, subject to arrest and prosecution under the trespass statute. The police were not enforcing a policy or custom of racial segregation. They were enforcing a criminal statute based solely on private property rights without regard to race, color or creed. The customs of the people of a state do not constitute state action within the prohibition of the Fourteenth Amendment, and it has been so held repeatedly. *State v. Avent, supra; Williams v. Howard Johnson's Restaurant, supra; Williams v. Hot Shoppes, Inc.*, 293 F. (2d) 835.

The position of the City of Charleston has been perhaps best stated by the North Carolina Supreme Court in *State v. Avent, supra*, at page 54, where the Court stated as follows:

> "Private rights and privileges in a peaceful society living under a constitutional form of government like ours are inconceivable without State machinery by which they are enforced. Courts must act when parties apply to them—even refusal to act is a positive declaration of law—and, hence, there is a fundamental inconsistency in speaking of the rights of an individual who cannot have judicial recognition of his rights. All the State did in these cases was to give or create a neutral

legal framework in which S. H. Kress and Company could protect its private property from trespassers upon it in violation of G. S. Sec. 14-134 and G. S. Section 14-126. There is a recognizable difference between State action that protects the plain legal right of a person to prevent trespassers from going upon his land after being forbidden, or remaining upon his land after a demand that they leave, even though it enforces the clear legal right of racial discrimination of the owner, and State action enforcing covenants restricting the use or occupancy of real property to persons of the Caucasian race. The fact that the State provides a system of courts so that S. H. Kress and Company can enforce its legal rights against trespassers upon its private property in violation of G. S. Sec. 14-134 and G. S. Sec. 14-126, and the acts of its judicial officers, in their official capacities, cannot fairly be said to be State action enforcing racial segregation in violation of the 14th Amendment to the Federal Constitution. Such judicial process violates no rights of the Defendants guaranteed to them by Article I, Sec. 17, of the State Constitution. To rule as contended by Defendants would mean that S. H. Kress and Company could enforce its rights against White trespassers alone, but not against Negro trespassers, and White and Negro trespassers in company. Surely, that would not be an impartial administration of the law, for it would be a denial to the White race of the equal protection of the law. If a land owner or one in possession of land cannot protect his natural, inherent and constitutional right to have his land free from unlawful invasion by Negro and White trespassers in a case like this by judicial process as here, because it is a State action, then he has no other alternative but to eject them with a gentle hand if he can, with a strong hand if he must. Annotation 9 A. L. R., p. 379 quoted above; 4 Am. Jur., Assault and Battery, Sec. 76, p. 167; 6 C. J. S. Assault and Battery Sec. 20 (2). This is said in 4 Am. Jur., Assault and Battery, Sec. 76, p. 168: 'Even though the nature of the business of the owner

> of property is such as impliedly to invite to his premises persons seeking to do business with him, he may, nevertheless, in most instances refuse to allow a certain person to come on his premises, and if such person does thereafter enter his premises, he is subject to ejection although his conduct on the particular occasion is not wrongful.' . . . White people also have constitutional rights as well as Negroes, which must be protected, if our constitutional form of government is not to vanish from the face of the earth.
> This is said in an article designated 'The Meaning of State Action' by Thomas P. Lewis, Associate Professor of Law, University of Kentucky, and appearing in Columbia Law Review, December, 1960, Vol. 60, No. 8, in note 134, page 1122: 'State court recognition of the restaurateur's private discrimination could be in the form of denial of any action against him by an aggrieved party. A related issue is the ability of the state to enforce through arrest and an action for trespass the discrimination of the private owner. None of the interpretations of Shelley (*Shelley v. Kraemer*, 334 U. S. 1, 68 S. Ct. 836, 92 L. Ed. 1161) of which the writer is aware, except Professor Ming's, *supra* note 92 (Racial Restrictions and the Fourteenth Amendment: The Restrictive Covenant Cases, 16 U. Chi. L. Rev. 203 (1949)) would extend it to this kind of case'."

No statutory or constitutional law, either of the State of South Carolina or of the City of Charleston, requires the segregation of races in public restaurants. Consequently, there is no violation present of the provisions of the Fourteenth Amendment which prohibit the states from making or enforcing any law abridging the privileges and immunities of citizens of the United States, or denying to any person the equal protection of the law.

The trespass statute of South Carolina is obviously designed to protect private property rights of all citizens, but it does not authorize State and City officials to control the management of a business or to dictate what persons

shall be served. As stated by the Supreme Court of the United States, in *Shelley v. Kraemer*, 334 U. S. 1, 68 S. Ct. 836, 842, 92 L. Ed. 1161:

> "Since the decisions of this Court in the Civil Rights Cases, 1883, 109 U. S. 3, 3 S. Ct. 18, 27 L. Ed. 835, the principle has become firmly embedded in our constitutional law that the action inhibited by the first Section of the Fourteenth Amendment is only such action as may fairly be said to be that of the States. That Amendment erects no shield against merely private conduct, however discriminatory or wrongful."

See also in this connection *Williams v. Howard Johnson's Restaurant, supra.*

While it is true that there is State action present to the extent of the enforcement of a trespass statute protecting private property rights, it is also true that this statute, by its long history and enforcement, is not concerned with racial differences or the perpetuation of segregation. It applies to a negro home and gives protection to the owner thereof, as it does to a white home and the owner thereof. It protects negroes' businesses from serving negroes, whites, redhead people, people of objectionable ages, or anyone else. To hold such a statute unconstitutional would result in chaos. Private ownership would be meaningless without the power to determine who shall stay and who shall go. A lessee of a small grocery store could not evict or have arrested a person who refuses to leave the premises when ordered. He would be left to his own devices, as the early American pioneers, with the consequent, inevitable violence.

Petitioners have cited numerous decisions, none of which, however, deal with the issue now before this Court.

The case of *Boynton v. Virginia*, 364 U. S. 454, 81 S. Ct. 182, is apparently relied on by Petitioners in support of their argument that the statute is unconstitutional, if

applied to a customer refusing to leave private business premises. However, this decision of the United States Supreme Court in 1960 involved the application of the Interstate Commerce Act of the United States. The majority opinion does not pass on any constitutional issue, including the issue raised by the Petitioners under the Fourteenth Amendment. The Court, however, did have the following to say:

> "Because of some of the arguments made here, it is necessary to say a word about what we are not deciding. We are not holding that every time a bus stops at a wholly independent roadside restaurant, the Interstate Commerce Act requires that restaurant service be supplied in harmony with the provisions of that act."

Petitioners also cite *Shelley v. Kraemer, supra,* which is inapplicable, inasmuch as it involved the enforcement by a Court of racial restrictions. It was not necessary to prove Petitioners were Negroes to obtain a conviction for trespass. Their race or national origin was meaningless in the prosecution of the case.

Petitioners cite *Marsh v. State of Alabama*, 326 U. S. 501, 66 S. Ct. 276. However, Petitioners were not sitting on a company owned sidewalk or right-of-way which was freely accessible and the business block of a community shopping center. The *Marsh case* did not involve the rights of the owner of a private business within his establishment as does the instant case. Consequently, Petitioners' analogy is not proper, that the lessee or owner of a private business establishment must serve even one he does not wish to serve. The *Marsh case* must be limited to its particular facts, namely, a company owned sidewalk near a post office in a business block in a suburb owned by a shipbuilding corporation.

The Fourteenth Amendment does not deny a citizen the right to be racially prejudiced and racially discrimina-

tory. This, too, is a freedom that is protected. If Kress, in the exercise of its rights under the Constitution of the United States, determines to be racially discriminatory and determines to remove Negroes from its lunch counter, it certainly has such a right and must bear the economic results of such policy. After all, Petitioners were not arrested because they were Negroes, nor because they sat at a lunch counter, nor because they remained at the lunch counter for several hours. They were arrested and tried on a warrant sworn out by Kress for refusing to leave private property when requested to do so by the owner.

It has been said that freedom of speech is freedom for the speech that one abhors. It follows, therefore, that freedom of association and freedom to use property to serve or entertain those one wishes may be freedom some abhor, but, nevertheless, they are freedoms that are protected by the United States Constitution.

It should not be overlooked that although Petitioners may not have been served at 10:45 o'clock, a. m., because Kress was allegedly exercising racial discrimination, Petitioners were not requested to leave because of racial discrimination. They sat mute and unmolested for over five hours. The manager was advised of a bomb threat; all persons in the store, both white and colored, were requested to leave for this reason. Only Petitioners chose not to comply. Only Petitioners chose to remain. Only Petitioners chose to become trespassers. Only Petitioners chose to demand police action.

CONCLUSION

It is respectfully submitted that the Supreme Court of South Carolina decided all Federal questions in accordance with the applicable decisions of this Court and the Constitution of the United States, and the Petition for Writ of Certiorari should be denied.

Respectfully submitted,

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